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Supreme Court of the United States

OCTOBER TERM, 1954

No. 50

THE BISSO No. 9

**WILLIAM A. BISSO, JR., RECEIVER,
NEW ORLEANS COAL AND BISSO TOWBOAT CO.**
Petitioner

versus

INLAND WATERWAYS CORPORATION
Respondent

On Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the district court (R 27) was rendered on September 1, 1953, and is reported at 114 FS 713, 1953 AMC 1664. The opinion of the court of appeals (R 35)

was rendered on March 26, 1954 and is reported at 211 F2d 401, 1954 AMC 648.

JURISDICTION

Jurisdiction of this court was invoked by petition for writ of certiorari filed on April 26, 1954, under 28 USC 1254. Certiorari was granted on October 14, 1954, US .

QUESTION PRESENTED

The question presented for review is, generally, whether a tug may contract against liability for her negligent towage of unmanned vessels; and, particularly, whether the "release towage" and "modified pilotage" clauses in current use in towage contracts may have such effect.

STATEMENT OF THE CASE

Petitioner, owner of the Barge *Bisso No. 9*, brought this action to recover for loss of the barge while in tow by respondent, an agency of the United States Government.[1]

The towage contract contained customary "release towage" and "modified pilotage" clauses, providing respectively:

> "The movement contemplated will be done at the sole risk of the 'craft to be towed' and its cargo, and neither the (tow) boats and/or any other equipment used in said (towage) service

[1] R 1-2, 4.

> nor the owner, charterer or hirer thereof shall be liable for any loss or damage to the 'craft to be towed' or its cargo nor for any damage done by the 'craft to be towed', however occurring.
>
> "The master and crews and employees of all (tow) boats and/or other equipment assisting the 'craft to be towed', shall, in the performance of said service, become and be the servants of the 'craft to be towed', regardless of whether the 'craft to be towed' assists in the service in any way, and irrespective of whether they be aboard the 'craft to be towed' or in command thereof." [2]

While the unmanned and unpowered *Bisso No. 9*, with seven other similar barges of other owners, was in tow of respondent's Towboat *Cairo*, the barge was brought into collision with a bridge pier and was lost through the towboat's negligence.[3]

The district court concluded that the "release towage" clause was insufficient by its terms to relieve respondent from liability for its negligence, but that the "modified pilotage" clause had that effect. The action was accordingly dismissed.

Affirming, the court of appeals held that "not merely one, as found by the district judge, but both of the clauses relied on are valid and effective to release the appellee from liability".

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[2] R 11-12.

[3] "The District Court . . . held that the collision was attributable to the negligence of the Cairo". R 36; 211 F2d at 402. This finding has not been contested on appeal.

SUMMARY OF ARGUMENT

Decisions of this court and of other admiralty courts have established and reiterated for nearly a century, the rule that a tower may not contract against liability for his own negligence in towing unmanned vessels.

This rule is amply supported by valid reasons of policy, and, having been left undisturbed by Congress in its intervening regulation of the towage industry, should not be altered judicially.

Alteration of the rule is not justified by this court's sanction of contractual exoneration of a mere assisting tug, from liability for the negligence of the tug captain while aboard the fully manned and powered assisted vessel, subject to the direct authority and control of that vessel's own master.

ARGUMENT

Background

Attempts by towers to stipulate against liability for their own negligence have been the subject of litigation in courts of the United States for almost a century.

In 1870, in *The Syracuse*, this court held that a towing steamer is liable for loss sustained by her tow "through the negligence of those in charge of" the steamboat, even though, "by special agreement", the tow "was being

towed at her own risk", because "although the policy of the law has not imposed on the towing boat the obligation resting on the common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill".[4]

From 1870 to 1909, this holding was followed in a number of decisions, none ever suggesting that it meant anything other than that a provision in a towage contract that the operation was to be at the risk of the tow, could not exonerate the tug from liability for her own negligence.[5]

But in 1909, in *The Oceanica*,[6] the Second Circuit concluded that *The Syracuse* need no longer be followed. The court held that, a tug not being a common carrier in relation to her tow, may validly contract against liability for damage to the tow, even when caused by the tug's own negligence.

Judge Coxe dissented, stating: "It ought to be against public policy to permit a vessel to contract against her own fault. To allow her to do so begets recklessness, care-

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[4] 12 Wall. (79 US) 167, 171 (1870).

[5] Thus, in *Alaska Commercial Co. vs Williams*, 128 Fed. 362, 366 (CA 9-1904), the Ninth Circuit, citing *The Syracuse*, held, as later stated by the same court in *Mylroie vs British Columbia Mills Tug & Barge Co.*, 268 Fed. 449, 451 (CA 9-1920), aff'd, 259 US 1, that a tug is "not allowed by law to avoid by contract the consequences of its own negligence". See also, *e. g.*, *Deems vs Albany & Canal Line*, FC No. 3736 (CC NY-1878); *Ulrich vs The Sunbeam*, FC No. 14329 (DC NJ-1878); *The M. J. Cummings*, 18 Fed. 178 (ND NY-1883); *The Rescue*, 24 Fed. 190 (WD Pa.-1885); *The American Eagle*, 54 Fed. 1010 (ND Ohio-1893); *The Jonty Jenks*, 54 Fed. 1021 (ND NY-1893); *In re Moran*, 120 Fed. 556 (ED NY-1903); *The Somers N. Smith*, 120 Fed. 569 (DC Me.-1903).

[6] 170 Fed. 893 (CA 2-1909).

lessness and neglect. The same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it".

On rehearing, Judge Ward conceded: "We do appreciate keenly that the decision of the majority of the court as to the right of a tug to contract against her own negligence is a departure from previous decisions. The question should, and we hope will, be set at rest in this case by the Supreme Court." But certiorari was denied.[7]

In 1920, the Ninth Circuit decided *Mylroie vs British Columbia Mills Tug & Barge Co.*, which involved a towage contract providing that "the tug company is not to be held liable for any damage which might happen to the said barge Bangor or its cargo while in tow or at anchor". The court expressly refused to follow the holding of the Second Circuit in *The Oceanica;* and stated that it felt itself bound by this court's opinion in *The Syracuse* to hold that a tug may not validly contract against liability for her own negligence.[8]

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[7] 215 US 599. The Second Circuit has subsequently thrice reiterated the holding of *The Oceanica*. See *Monk vs Cornell Steamboat Co.*, 198 Fed. 472 (CA 2-1912); *Ter Eyck vs Director General of Railroads*, 267 Fed. 974 (CA 2-1920); *North River Barge Line vs Chile SS Co.*, 213 F2d 882 (CA 2-1954).

[8] 268 Fed. 449 (CA 9-1920), aff'd, 259 US 1. Certiorari was granted in this case, and the decision was affirmed, but this court found "it unnecessary . . . to consider the contention on behalf of the barge that the exemption clause is void". 259 US at 12. See also *The Vim*, 40 F2d 638 (DC RI-1930); *The Sea Lion*, 12 F2d 124 (ND Calif.-1926); *The Skagway*, 1925 AMC 1133 (WD Wash.).

In 1928, in *The Wash Gray*, this court apparently resolved the inter-circuit conflict, citing *The Syracuse* as still representing the "state of the law", and holding that a clause in a towage contract to the effect that the towing vessel was not to be "responsible in any way for loss or damage to" her tow, "did not release" the towing vessel from loss thereof, or damage thereto, if caused by "the negligence of the master or crew of the towing vessel".[9]

This court's third decision of possible relevance is that in *Stevens vs The White City*.[10] In the course of holding that evidence of damage to a tow while in custody of its tug does not create a presumption of negligence, this court took occasion to say that "under a towage contract the tug is not a bailee of the vessel in tow".[11]

However, the opinion clearly reflects that the holding to which reference is made, and the *dictum* quoted, in the preceding paragraph, are applicable only to towage of a single vessel actually or customarily manned during the towage operation: "The tug . . . and those in charge of her . . . do not have control such as belongs to common carriers and other bailees. They have no authority over

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[9] 277 US 66, 73 (1928). The opinion of the Second Circuit in *The Oceanica* was cited to this court (277 US at 70) but was not mentioned by it in its opinion. "In *The Steamer Syracuse*, the Supreme Court squarely held such an attempt (by a tug to contract against liability for her own negligence) invalid, recognizing at the same time that the tug was neither a common carrier nor a bailee. Again, in *Compania de Navegacion Interior vs Firemen's Fund Insurance Company (The Wash Gray)*, the court incidentally, if not squarely, affirmed the doctrine of the former case." *Note*, 28 Cornell Law Quarterly 194, 195 (1943). See also: *Note*, 26 Cornell Law Quarterly 303 (1941); Robinson, *Handbook of Admiralty Law* (1939) 672.

[10] 285 US 195 (1932).

[11] *Id.* at 200.

the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment." [12]

The lower admiralty courts have consistently declined to extend that holding and *dictum* to cases of towage of unmanned, non-self-propelled barges as in the situation at bar.[13]

The last pertinent decision of this court was rendered in *Sun Oil Company vs Dalzell Towing Company.*[14]

In that case, a tanker was stranded and damaged while being docked under her own power and using her own steering mechanism, with her own master and crew at their stations, being assisted in the maneuver by tugs, the captain of one of which was on the bridge of the tanker acting as her pilot. The casualty resulted from

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[12] *Ibid.*

[13] In *Turecamo Towing Corporation vs United States*, 125 F2d 1001, 1002 (CA 2-1942), Judge Clark suggested that "the pains the (Supreme) Court takes (in the *Stevens* opinion) to emphasize the lack of surrender of control in the ordinary towage contract" implies non-applicability of the rule of that decision in cases of towage involving cession to the tug of complete control of an unmanned tow. See also *Sternberg Dredging Co. vs Moran Towing & Transportation Co.*, 196 F2d 1002, especially on rehearing, 200 F2d 603 (CA 2-1953).

[14] 287 US 291 (1932).

the negligence of the tug captain aboard the tanker, not from the negligence of either tug.

The docking maneuver was being performed under an agreement which contained the following pilotage clause:

> "When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom."

This court enforced the clause in the situation presented, as "an application of the well-established rule that when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for, and is to be deemed the employee of, the latter and not of the former".[15]

The Second Circuit had stated, in its opinion in the same case, that "a distinction may well be taken between a towage contract as such and a pilotage contract", and had stressed the difference between a situation in which "the 'assisted vessel' is under her own power and the

[15] *Id.* at 294-95.

towing company merely supplies a tug master as a pilot', and that in which "a tug owner is engaged in towing a dead vessel".[16]

This court also called particular attention to the fact that "the services covered by the contract were less than towage"; that the towing company did not undertake "to do more than to furnish tugs to assist" the vessel "while using her own propelling power . . . and steering apparatus"; and that at no time did the towing company have "control of the tanker", but, on the contrary, "her master, officers and crew were at their stations".[17]

Analysis

In *The Syracuse* and *The Wash Gray*, discussed in the foregoing subdivision of this brief, this court clearly held that the tower of an unmanned vessel may not stipulate against liability for his own negligence in performance of that operation.[18]

The decisions have been so interpreted and applied over the years by a majority of the lower admiralty courts which have considered them; and are justly founded in the legitimate concept that such towage creates a bail-

[16] 55 F2d 63, 65 (CA 2-1932).

[17] 287 US at 293-4.

[18] The exegesis of the district court below—rightly rejected by the court of appeals—to the effect that *The Syracuse* and *The Wash Gray* stand only for the proposition that the release-from-liability clauses involved were insufficiently specific to be construed as stipulations against liability for negligence [see also *The Pacific Maru*, 8 F2d 166 (SD Ga.-1925)], is not acceptable logically. As the Second Circuit has pointed out, the tug "being only liable for negligence (as was expressly recognized in the opinion in *The Syracuse*), if the tow agrees to assume all risks, no risks can be meant except those for which the tug is liable, viz., the consequences of her own negligence". *The Oceanica*, 170 Fed. 893, 894 (CA 2-1909), cert. den., 215 US 599.

ment relation affected in large measure with the public interest.[19]

It is submitted that so sound a rule, so well supported for so long a time, should not now be disturbed; especially in light of Congress' abstention from alteration of the rule in the course of its intervening regulatory activities in the field.[20]

The extent to which towage of the type here involved is affected with the public interest, is perhaps best indicated by those very Congressional regulatory activities, which have extended to such towage together with other classes of inland common and contract carriage by water.

It is worthy of particular note in this connection, that Congress has never seen fit to encourage the towage industry by extending to towers the privileges, for exoneration from liability, granted to cargo vessels, for encouragement of that branch of maritime commerce, by the Harter and Carriage of Goods by Sea Acts.[21]

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[19] See cases cited in footnotes 5 and 8 *supra;* and *The Walter G. Hougland,* 184 F2d 530 (CA 6-1950); *Great Lakes Towing Co. vs American SS Co.,* 165 F2d 368 (CA 2-1948), cert. den., 333 US 881; *Hall-Scott Motor Car Co. vs Universal Ins. Co.,* 122 F2d 531 (CA 9-1941); *Petterson Lighterage & Towing Corp. vs The J. Raymond Russell,* 87 FS 467 (SD NY-1949). *Cf.* cases cited in footnotes 6 and 7 *supra* and 31 *post;* and *The John J. Feeney,* 3 FS 270 (ED NY-1933); *The Primrose,* 3 FS 267 (ED NY-1933); *The Mercer,* 14 F2d 488 (ED NY-1926). In *North River Barge Line vs Chile SS Co.,* 213 F2d 882 (CA 2-1954), the Second Circuit took cognizance of the holding of *The Syracuse* and *The Wash Gray,* but erroneously concluded that that holding had been overruled in the *Sun Oil* case.

[20] *Cf. United States vs Atlantic Mutual Ins. Co.,* 343 US 236 (1952). Congress regulated towage in the Transportation Act of 1940, 49 USC 901 *et seq.* See *Cornell Steamboat Co. vs United States,* 321 US 634 (1944).

[21] 46 USC 190 *et seq.* and 1301 *et seq.*

The considerations precluding contractual exemption of a bailee for hire from liability for his negligence, apply equally to towage of unmanned barges, whether the primary consideration be the unequal bargaining positions of the parties to the contract,[22] or the bailee's exclusive control of the thing bailed as intimated in *Stevens vs The White City*.[23]

An additional important ground of policy for the same result, peculiarly applicable to the bailments involved in towage and transportation by water generally, is the public interest in maintaining high standards of skill and care in navigation[24]—particularly in the restricted inland

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[22] See discussion in *Note, Limiting Liability for Own Negligence*, 175 ALR 8, 16 (1948). Practical universality of the practice among towers of inserting in their towage contracts stipulations against liability for their own negligence, is demonstrated both by the motion of *amici curiae* in the court of appeals (reprinted in the *Appendix* hereto) and by the large number of cases in various courts involving such stipulations, cited herein, in the other briefs filed in the two companion cases to this, now pending in this court (*Boston Metals Co. vs The Winding Gulf*, No. 70, and *United States vs Nielson*, No. 210), and in *Note, Towage Contracts—Injury to Tow*, 54 ALR 104, 243 *ff.* (1928).

[23] In which this court's refusal to equate a certain type of towage with bailment was predicated on the distinction that towers of manned vessels "do not have control such as belongs to common carriers and other bailees". 285 US at 200. Judge Coxe, in his dissent in *The Oceanica*, 170 Fed. 893, 896 (CA 2-1909), cert. den., 215 US 559, pointed out that the purpose of rules against contractual limitation of liability for negligence "is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it". See also *Bussey & Co. vs Mississippi Valley Transp. Co.*, 24 La. Ann. 165 (1872).

[24] "The vast interests, which are daily confided to such steam tugs, the hazards to which our internal commerce may be subjected by a want of the highest degree of skill and care on the part of those who command them . . . these considerations urge us very strongly to hold the steam tug to the rigid accountability of a common carrier." *Vanderslice vs The Superior*, FC No. 16,843 (ED Pa.-1850). *Cf.* Frankfurter, J., dissenting, in *United States vs Atlantic Mutual Ins. Co.*, 343 US 236, 244 (1952): Underlying the same rule as to cargo vessels is "the premise that such an agreement, if enforced, would tend to relax the vigilance and care in seamanship which the threat of liability encouraged".

waterways on which towage operations of the class which this case concerns have in recent years reached their apogee.[25]

There is no occasion here to contend for outright repeal in all of its aspects of the oft-stated rule that towage is not synonymous with common carriage.[26] Suffice it to emphasize the postulate that, as this court held expressly in *The Syracuse*, non-equivalence of the two relationships for certain limited purposes, affects in no degree the validity of the common reasons for forbidding, in both, self-exoneration from all responsibility for reckless conduct.

Those reasons have never been epitomized more succinctly than by Judge Coxe in his dissent in *The Oceanica*, in which he said that "it ought to be against public policy to permit a vessel to contract against her own fault", because "to allow her to do so begets recklessness, carelessness and neglect"; and that "the same reasons for prohibiting such a contract in the case of common carriers

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[25] The greatest development in inland water transportation has come since 1925. See Senate Report 433, 76th Cong., 1st Sess., Minority Views, p. 6; Senate Document 152, 73rd Cong., 2d Sess., pp. 1-2.

[26] It should, however, be pointed out that both of the cases usually considered as having established the rule, dealt with towage of manned vessels, not dumb barges. *The Webb*, 14 Wall. (81 US) 406 (1871); *The Margaret* 94 US 494 (1876). In his work on *Bailments and Carriers* (1914) 309-10, Judge Dobie stressed lack of exclusive custody or control as the dominant reason why a tug is not the common carrier of her manned tow. Weighty arguments for a contrary rule for towage of unmanned vessels, were marshaled by the Supreme Court of Louisiana, the leading American civil-law jurisdiction, in *Bussey & Co. vs Mississippi Valley Transp. Co.*, 24 La. Ann. 165 (1872). See also *Vanderslice vs The Superior*, FC No. 16,843 (ED Pa.-1950); and *Alexander vs Greene*, 7 Hill 533 (NY-1844). This court's opinion in *Sturgis* vs *Boyer*, 24 How. (65 US) 110, 122 (1860), seems to connote the same result in its analogy of an unmanned tow, for the purposes of that case at least, to "so much freight".

apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it."[27]

The decision under review is based on the concept that since towers are not common carriers, they have unrestricted license to insert in their contracts such exculpatory clauses as their superior trading position may allow.

That concept is inconsistent with present-day recognition of the necessity, arising from increasing crystallization and stratification of the economy, for regulation of the relationships arising from most established business statuses[28]—a necessity which has been felt particularly strongly in the field of transportation;[29] and has not forestalled preclusion of limitation of negligence liability in bailments for hire,[30] to which, as pointed out, towage of unmanned barges is essentially similar in its relevant aspects.

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[27] 170 Fed. 893, 896 (CA 2-1909), cert. den., 215 US 599.

[28] "The present trend away from the freedom of contract and toward status is evidenced by the geometrically accelerated return to thrust-law, relational obligations in the form of standardized contracts, administrative board regulations, *et cetera*. Thompson, *Some Current Economic and Political Impacts in the Law of Contract*, 26 Cornell Law Quarterly 4, 13 (1940)." *Note, Ibid.*, 304.

[29] "This country is definitely committed to the theory of regulating all interstate transportation for the public." House Report 1217, 76th Cong., 1st Sess., p. 2. The subject of the cited report was the bill which eventually became the Transportation Act of 1940, regulatory of various types of transportation by water, including towage. See footnote 20 *supra*.

[30] See *Note, Limiting Liability for Own Negligence*, 175 ALR 8, 110 *ff.* (1948).

The decision under review is grounded on the same error as was *Mengel Co. vs Inland Waterways Corporation,*[31] which, in the words of one commentator, "stressed . . . the 'paramount public policy' in favor of freedom of contract", relying principally "upon the well-known opinion of Sir George Jessel, M. R., in *Printing Co. vs Sampson* (1875): 'If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting' ".

The commentator adds: "This general philosophy, however, has less standing today than it did in Jessel's time. Moreover, it is not to be denied that one will be more careful and diligent when he stands beneath the Damoclean sword of liability for his negligence. This, in essence, was the theory upon which *The Syracuse* and the cases following it were based." [32]

Nothing in *Stevens vs The White City* or *Sun Oil Co. vs Dalzell Towing Co.* justifies departure from the rule of *The Syracuse* and *The Wash Gray.*

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[31] 34 FS 685 (ED La.-1940).

[32] *Note,* 26 Cornell Law Quarterly 303, 304 (1941). It may be noted at this point, that British decisions upholding release-towage agreements [such as *The Albion* (1953) 2 All ER 679 (CA)], bear no analogy to the case at bar. Those decisions were rendered in express or tacit recognition of the circumstance that the types of towage largely prevailing in England are harbor and docking maneuvers and deep-sea operations, all involving manned, self-propelled vessels. The resultant inapplicability of English towage precedents to American cases involving towage of unmanned river and canal barges, has been recognized by both English and American courts. See *The American* (1874) LR 6 PC 127; *The Belknap,* FC No. 1244 (DC Mass.-1873). Besides, as a matter of judicial tradition in Great Britain, even "common carriers, by land or sea" were, until adoption of relatively recent statutory restrictions, unqualifiedly "permitted to exempt themselves by express contract from responsibility for losses occasioned by negligence of their servants". *Liverpool Steam Co. vs Phenix Ins. Co.,* 129 US 397, 447 (1889).

As noted above, the refusal in the *Stevens* case to equate towage of manned vessels to bailment for purposes unrelated to limitation of liability, has not been extended by the lower admiralty courts for any purpose to towage of helpless barges—individual manning of which would often be a practical impossibility [33]—under the complete domination and absolute control of their tugs.

On the contrary, the courts have evolved rules of law governing towage of unmanned vessels so nearly approaching those applied to common carriers and other professional bailees, that respondent seized on them in support of its argument below, as paraphrased by the court of appeals, that "the situation of a tug with a dumb tow makes it more necessary for it to relieve itself of what may approach an insurer's liability".[34]

The *Sun Oil* holding is similarly inapropos to the situation at bar.

There are obvious fundamental relational differences between mere assistance by tugs in docking a manned and self-propelled vessel operating under her own steerageway, power and command; and towage of large fleets of unpowered and unmanned cargo barges belonging to different owners.

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[33] Cargo barge flotillas have consisted of as many as "forty and fifty barges at a time". Rosskam, *Towboat River* (1948) 17, 18, 59. See also Durant, *Pictorial History of American Ships* (1953) 282; *The Belknap*, FC No. 1244 (DC Mass.-1873). *The Syracuse* involved a forty-barge tow. The fleet involved in the tow in the instant case consisted of eight unmanned cargo barges belonging to different owners. R 23.

[34] R 37; 211 F2d at 403. See respondent's brief in the court of appeals, p. 15, citing *The Webb*, 14 Wall. (81 US) 406 (1872); *Sternberg Dredging Co. vs Moran Towing & Transp. Co.*, 196 F2d 1002, on rehearing, 200 F2d 603 (CA 2-1952); and *Simkins vs R. L. Morrison & Sons*, 107 F2d 121 (CA 5-1939). In *Sturgis vs Boyer*, 24 How. (65 US) 110 (1860), this court delineated some of the legal consequences of the clear distinction between towage of manned and unmanned vessels.

The language of the *Sun Oil* opinion makes clear that the validity of the pilotage clause in that case was based on the presence of the master of the assisted vessel at his station in command of his own crew and of his ship—proceeding under her own power and steerageway—with authority to direct and even to remove the pilot.[35]

As stated by the Southern District of New York, the *Sun Oil* decision was not intended to upset the long-standing proscription of towers'-release clauses, but only to establish a particular rule for the "special case . . . when the tow is under power and in control of the tower's (tow's) servants".[36]

Conformably to this view, the Sixth Circuit has declined to extend the rule of the *Sun Oil* case even to a harbor maneuver performed under the assisted vessel's own power and steerage, with her master in command, when the

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[35] The fact that there is a pilot on the bridge does not alter the master's ultimate command of his vessel: "The master need not have allowed the pilot to conduct the navigation unless he was satisfied to trust it to him, and if dissatisfied he could have removed him." *The West Eldara*, 101 F2d 45, 47, mod., 104 F2d 670 (CA 2-1939), cert. den., 308 US 607.

[36] *Petterson Lighterage & Towing Corp. vs The J. Raymond Russell*, 87 FS 467, 470 (SD NY-1949). Accord: *Hall-Scott Motor Car Co. vs Universal Ins. Co.*, 122 F2d 531 (CA 9-1941), cert. den., 314 US 690. "If it be intimated that *Sun Oil Company vs Dalzell Towing Company, Inc.* may have modified the other two cases (*The Syracuse* and *The Wash Gray*), it is submitted, however, that the last case stands alone on its peculiar facts." *Note*, 28 Cornell Law Quarterly 194, 195 (1943). There would simply seem to be no basis for the very recent gratuitous assumption by the Court of Appeals for the Second Circuit that *Sun Oil Co. vs Dalzell* "is to be taken as, in effect, accepting the doctrine of the *Oceanica*". *North River Barge Line vs Chile SS Co.*, 213 F2d 882, 884 (CA 2-1954).

tug captain acted "on his own initiative, without subordination to" the master of the assisted vessel.[37]

CONCLUSION

In light of the considerations hereinabove expressed, it is respectfully submitted that no greater justification appears for judicial alteration of the established and salutary rule against contractual exemption from liability for their own negligence by towers of unmanned vessels, than appeared in *United States vs Atlantic Mutual Insurance Co.* for changing the same rule as applied to common carriers by water;[38] that the opinion under review is accordingly erroneous; and that that decision should be reversed and the cause remanded to the district court with directions to enter judgment for petitioner.

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Of Counsel

November, 1954

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[37] *Great Lakes Towing Co. vs Bethlehem Transp. Corp.*, 65 F2d 543, 544 (CA 6-1933). Accord: *Great Lakes Towing Co. vs American SS Co.*, 165 F2d 368 (CA 6-1948), cert. den., 333 US 881. See also *American South African Line vs Sheridan & Co.*, 1936 AMC 287 (ED Pa.). Contra: *Boston Metals Co. vs The Winding Gulf*, 209 F2d 410 (CA 1-1954), cert. gr., October 14, 1954, US , No. 70 on the docket of this court for the present term.

[38] 343 US 236, 242 (1952): "Here, once more, 'we think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests' of the varied groups who would be affected by permitting carriers to deviate from the controlling rule that without congressional authority they cannot stipulate against their own negligence or that of their agents or servants. If that rule is to be changed, the Congress, not the shipowners, should change it."

APPENDIX

Motion For Leave To File Brief As Amici Curiae
(In the Court of Appeals)

Now come Selim B. Lemle, Charles Kohlmeyer, Jr., and George B. Matthews and show that they are counsel for American Barge Lines, Inc., Coyle Lines Incorporated, Crescent Towing & Salvage Co., Inc., Dixie Carriers, Inc., John I. Hay Company, Mississippi Valley Barge Line Company, Mobile Towing & Wrecking Co., and Union Barge Line Corporation; that Crescent Towing & Salvage Co., Inc. and Mobile Towing & Wrecking Co., Inc. are the owners and operators of large fleets of habor tugs in New Orleans and Mobile respectively; and that all of the other parties are owners and operators of feets of river towboats and barges plying the Mississippi River and its tributaries and the Intracoastal Canal.

Movers show that the parties all perform towing services for each other and the public at large under towage contracts containing provisions for the release from liability of towing craft for its negligence substantially similar to the release clause, the validity of which has been attacked in the instant case; that the interpretation placed on the release clause will have a material effect upon the methods of doing business of all the parties whom movers represent; and accordingly movers pray for leave to file the attached brief as *Amici Curiae* in support of Appellee.